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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 LIONEL RUBALCAVA,

15 Petitioner,

16 v.

17 TOM FELKER, Warden,

18 Respondent.
19

Case No. C 07-5379 SBA

PETITIONER'S TRAVERSE IN
SUPPORT OF PETITION FOR
WRIT OF HABEAS CORPUS

20 TO THE HONORABLE SAUNDRA BROWN ARMSTRONG:

21 Pursuant to 28 U.S.C. section 2254, petitioner respectfully submits his
22 traverse in support of his petition for writ of habeas corpus.

23 Dated: February 5, 2008

Respectfully submitted,

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26 Allen H. Schwartz
27 Attorney for Petitioner
28 Lionel Rubalcava

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STATEMENT OF FACTS*Prosecution Evidence*

Raymond Rodriguez was shot on April 5, 2002, after coming home from the movies with his family. (RT 78, 106-107)¹. Rodriguez was a member of the Varrio East Side Norteno (VEN) gang while living at his previous address. (RT 81-82). After he moved to Mastic Street, in West Side Mob gang territory, he continued to hang out with VEN. (RT 88).

On the day of the shooting, Rodriguez came back from the movies and went to visit his next door neighbor, David Gonzalez, Jr. (RT 95). Rodriguez and his brother Eric, as well as other friends including Daniel Cerecerez, were visiting on the front lawn when Rodriguez saw a blue SUV driving slowly down the Street. (RT 96-97). Rodriguez asked his neighbor who was in the car and Gonzalez responded that it was someone who was "tripping" all day. (RT 99). The car made a U-turn and Rodriguez went to the curb. (RT 100, 102). The truck stopped in front of Rodriguez's house. (RT 102-103). At first Rodriguez thought the driver was his friend Chris, but then realized it was not. (RT 142).

Rodriguez raised his hands and said, "What's up?" (RT 107). From a range of 12 to 25 feet, the driver shot Rodriguez. (RT 114-115). At the trial Rodriguez identified petitioner as the driver. (RT 115, 116).

Rodriguez suffered paralysis from the waist down. (RT 126). He also suffered from memory loss as a result of the shooting. (RT 140). At trial, Rodriguez did not remember talking to the police officers the night after the shooting or the day after that. (RT 125). He did remember that Detective Joe Perez showed him a photographic lineup, but he could not identify anyone. (RT 129). Sometime later he

¹ RT refers to the Reporter's Transcript of the trial. These transcripts have been lodged as exhibits with the court. (Respondent's Exhibit F.)

1 was shown a lineup and circled a picture of the person whom he believed shot him.
2 (RT 129). Rodriguez continually gave inconsistent descriptions of the shooter. (RT
3 130, 133, 134).

4 Rodriguez's younger brother, Eric, testified that the car driving slowly down
5 the Street was a green Toyota. (RT 162). He stood next to Rodriguez's left shoulder
6 when the car came to a stop. (RT 165). He saw four people in the car, two in the
7 front and two in the back. (RT 166). The driver spoke to Rodriguez but Eric could not
8 hear what he said. (RT 166-167). Eric had never heard of Lionel Rubalcava before,
9 but identified him in court as the shooter. (RT 171-172).

10 Police officers Fonua and Spillman showed Eric a photographic lineup with
11 petitioner's picture first in the series. (RT 176, 178). He identified petitioner in the
12 lineup, (RT 178) but gave differing descriptions of the shooter. On April 5, 2002, he
13 said the shooter was a Hispanic male with black shaved hair, a thin moustache, and
14 a white shirt; the next day he said the man had a buzz haircut and no facial hair. (RT
15 183). At the preliminary hearing he said the man wore a white t-shirt and had a
16 moustache and hair on his chin but at the trial could not remember if the shooter had
17 facial hair. (RT 184).

18 Two days after the shooting the victim's sister, Jennifer, saw a light
19 colored truck drive up. (RT 213-214). The two male occupants called her over. (RT
20 215). The driver was handling something dark in color. (RT 216). Jennifer refused
21 to go over to the truck. (RT 216). She identified petitioner as the driver of the truck
22 that day. (RT223).

23 On the day of the shooting Nicholas Faria was visiting David Gonzalez on his
24 front lawn. (RT 258). He told police that a Toyota 4Runner drove up close to the
25 Rodriguez house, slowed down and then stopped. (RT 261). Faria described the
26 driver as a Hispanic male, 17 to 24 years old, with a shaved head. (RT 282). When
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1 the victim was about 10 feet from the driver, the driver pointed a black handgun at
2 the victim and shot him. (RT 283).

3 Daniel Cerecerez described petitioner as a friend and neighbor. (RT 286-287).
4 He had ridden in petitioner's black pickup truck. (RT 288). Cerecerez used to be in
5 the Varrio Horseshoe gang and the West Side Mob (WSM). (RT 292) He identified
6 petitioner as a member of the West Side gang. (RT 293). Cerecerez was also friends
7 with Rodriguez, and identified him as a Norteno gang member. (RT 301, 303).

8 On the day of the shooting, Cerecerez saw a black truck pull up. (RT 316). He
9 made eye contact with the front passenger in the truck but then looked away. (RT
10 346). He described the right front passenger as a Hispanic man in a tank top but
11 did not get a good look at the others in the truck because it was too dark inside of
12 it. (RT 324). He did not recognize anyone in the truck. (RT 348). Cerecerez heard
13 David Gonzalez Jr. say "go in the house" right before the shooting. (RT 325). He
14 then heard a gunshot and ducked. (RT 322-323).

15 David Gonzalez. Jr. testified that he is an associate member of the Varrios
16 Horseshoe Norteno gang. (RT 430). Before the shooting he was aware of tension
17 between Varrios Horseshoe and West Side Mob members. (RT 447). On the day
18 of the shooting, he made eye contact with the driver of the green Explorer truck and
19 claimed he recognized him. (RT 461, 458-459). Gonzalez warned his friends to get
20 off the street. (RT 470). From the side of his home he heard one gun shot. (RT 474).
21 Two days later he saw a black pickup truck drive by his home. (RT 481). He later
22 told police that the driver of the truck was petitioner who lived on Palm Street. (RT
23 486). He offered to lead police to the place where he had seen the black pickup truck
24 parked before. (RT 546). Gonzalez led them to a truck that was "very similar" to the
25 truck petitioner drove. (RT 547).

26 ///

1 *Gang Evidence*

2 Officer Rafael Nieves described the West Side Mob (WSM) as a formal
3 street gang in existence since the 1990's. (RT 589-90). Two of its members were
4 recently prosecuted for gang-related homicide. (RT 59-60). The gang is affiliated
5 with the Norteno Street gang; they wear red and identify with the number 14. (RT
6 591).

7 Nieves testified that petitioner is a member of WSM. (RT 597). He produced a
8 picture of petitioner with several West Side gang members. (RT 596-597). Nieves
9 also produced several field interview cards and investigation notes as evidence of
10 petitioner's affiliation. (RT 597-600). He presented a seized letter written by
11 petitioner in jail to another inmate with his signature as a WSM member. (RT 602).

12 The Varrio Horseshoe gang is also affiliated with the Norteno street gang,
13 adopts the color red and the number 14. (RT 63). In April, 2002, Nieves learned
14 that a conflict existed between WSM and the Varrio Horseshoe gang members. (RT
15 64). A Varrio Horseshoe graffiti "tag" was defaced by a WSM "tag." (RT 64). Also,
16 anger resulted from WSM members visiting a park in Varrio Horseshoe territory. (RT
17 65). WSM members apparently told Nieves that Varrios Horseshoe members had
18 disrespected a girlfriend of a West Side member. (RT 65). Finally, both gangs
19 competed for low-level narcotics territory. (RT 65-66).

20 *Petitioner's Defense*

21 Petitioner presented an alibi defense. At the time of the shooting he was
22 getting ready for a date. (RT 750). He checked the arrangements with his date,
23 Stephanie, by phone at 4:30 pm and left his home about 4:45pm to drive to Hollister
24 to meet her. (RT 756). He wore black slacks and a black dress shirt. (RT 756). He
25 drove to Hollister on the Monterrey Highway, taking more than an hour to get there
26 because of a stop to greet a cousin and buy a burrito; he arrived between 6:20 and
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6:35pm. (RT 845-849). He met Stephanie and they went to the movies arriving in time for the 7:00 pm show. (RT 658).

Two days after the shooting, petitioner drove down Mastic Street with a friend named Peter. (RT 766). He stopped the truck to say hello to a cute girl. (RT 766). The victim's sister, Jennifer, told petitioner about the shooting of her brother and the information surprised petitioner. (RT 830-831).

Petitioner denied being a current member of a gang; he considered himself "separated" from the West Side gang. (RT 722). He admitted writing the letter to another inmate in jail but only aligned himself with the gang in jail to gain protection. (RT 727).

Rebuttal Evidence

Petitioner's date, Stephanie, produced the tickets from the movie that she saw with petitioner the night of the shooting; they were purchased at 6:55 pm. (RT 863). Taking a different route than petitioner testified to, Detective Perez drove from Mastic Street to the meeting place in Hollister in one hour and one minute. (RT 893, 896). He stopped at petitioner's house for 30 seconds. (RT 893, 896).

ARGUMENT

I. THE EVIDENCE DOES NOT SUPPORT THE VERDICT;
THE DENIAL BY THE STATE COURT OF PETITIONER'S CLAIM
OF ACTUAL INNOCENCE IS AN "OBJECTIVELY UNREASONABLE"
APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

Rodriguez's identification of petitioner was a mistaken identification. At trial it was equivocal at best. Now, with time to reflect, Rodriguez recants his trial testimony and declares under penalty of perjury that he "did not tell the truth at trial". (Pet. Ex. B, ¶ 15.) Initially, he thought the driver of the vehicle was one of his friends. (RT 142, 143). After the shooting he suffered memory loss and at trial he did not remember his hospital stay clearly, or talking to the police, but did remember

1 that he did not identify anyone from the initial photographic lineup. (RT129-140). His
2 various descriptions of the shooter were inconsistent at best. (RT 130,132).

3 Respondent makes too much of Rodriguez's identification of petitioner. Further,
4 his little brother, Eric, is no more credible, since his identification was obviously
5 coached and influenced by his sister. (RT 189). If it was not coached and influenced
6 by her presence then again no rational jury would resolve the conflict in his testimony
7 in the People's favor: he could not remember from one minute to the next who was
8 with him when he viewed the lineups. (RT 198).

9 While respondent would like these identifications to be sufficient to support
10 the verdict, they are simply not reliable or credible such that a reasonable, rational
11 jury would believe them. It is rather more likely that, even if the other errors he
12 alleges were discounted, petitioner was convicted because he drove by the house
13 on Sunday, lied to his date about his identity, and because the victim was seriously
14 and obviously injured. While a juror would be moved by the victim's suffering and
15 might dislike petitioner, a juror is not permitted to convict a defendant in a criminal
16 case based on either sympathy or antipathy. Given the manifestly contradictory
17 eyewitness evidence and the complete absence of any other evidence, it is clear that
18 this jury convicted from passion, in disregard of its instructions. (CT 422.).

19 As will be seen below in the discussion of victim's recanting declaration, the
20 victim declares that the identification of petitioner from the photo line-up he first
21 viewed at hospital was unduly suggestive, making that and any subsequent
22 identification highly suspect.

23 *Victim's Recantation*

24 Victim Raymond Rodriguez signed a declaration under penalty of perjury
25 recanting his trial testimony in which he identified petitioner as the person who shot
26 him. (Pet. Ex. B). He was in hospital and heavily medicated when he was shown the
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1 photo line-up containing petitioner's image. Mr. Rodriguez states that he only told
2 police that petitioner looked like the person that shot him, but that he testified falsely
3 at trial because police had alluded to facts supposedly known only to them that
4 petitioner was the actual shooter. Mr. Rodriguez has reflected on what he has done
5 and now wants to do the right thing. He declares that the only time he ever saw
6 petitioner was in court. He is concerned about the whole identification process and
7 is troubled by the injustice he has done to petitioner. He now very much wants to
8 help police in finding the person who actually shot him. His declaration was given
9 freely and voluntarily and was not prompted by any promises or threats.

10 Respondent attempts to dismiss the declaration of victim Rodriguez by
11 claiming that recantations are generally suspect, and that a declaration cannot be
12 cross-examined and tested for credibility. (Resp. 19-20.) True, victim's declaration
13 cannot be cross-examined, but this is petitioner's offer of direct evidence of his
14 actual innocence. He welcomes and respectfully requests an evidentiary hearing so
15 that both victim and other witnesses can be examined in open court and petitioner's
16 actual innocence can be established.

17 "A conviction which rests on a mistaken identification is a gross miscarriage
18 of justice." (*Stovall v. Denno* (1967) 388 U.S. 293, 297; 87 S.Ct. 1967; 18 L.Ed.2d
19 1199.) Procedures by which the defendant is identified as the perpetrator therefore
20 must be examined to assess whether they are unduly suggestive. "It is the
21 likelihood of misidentification which violates a defendant's right to due process."
22 (*Neil v. Biggers*, (1972) 409 U.S. 188, 198; 93 S.Ct. 375; 34 L.Ed.2d 401.) Due
23 process protects against the admission of evidence deriving from suggestive
24 identification procedures. (*Id.* at 196). Unnecessarily suggestive identification
25 procedures alone do not require exclusion of in-court identification testimony,
26 however; reliability is the linchpin in determining the admissibility of identification

1 testimony. (*Id.* at 114, 97 S.Ct. 2243).

2 The victim certifies that he gave false evidence at trial when he misidentified
 3 petitioner. Petitioner was then prejudiced by the state court's denial of his petition for
 4 writ of habeas corpus. The state court should not have allowed false testimony to go
 5 unchallenged as it impairs the integrity of the factfinding objective of a trial. (*United*
 6 *States v. Havens* (1980) 446 U.S. 620, 627.) If the criminal judgment was obtained
 7 through the use of false evidence, petitioner's due process rights have been violated.
 8 (*Napue v. Illinois* (1959) 360 U.S. 264, 269.) That denial of the state court petition
 9 was an "objectively unreasonable" application of Sixth Amendment law. (*Wiggins v.*
 10 *Smith*, 539 U.S.510; state court judgment was "objectively unreasonable" insofar as
 11 a claim of actual innocence was rejected without a hearing.)

12
 13 II. THE CRAWFORD DECISION AND THE CONFRONTATION CLAUSE
 14 BAR THE GANG EXPERT FROM OFFERING HEARSAY STATEMENTS
 AS A BASIS FOR HIS OPINION THAT THE SHOOTING WAS DONE FOR
 THE BENEFIT OF A CRIMINAL STREET GANG.

15 The Sixth Amendment's Confrontation Clause provides that in all criminal
 16 prosecutions, the accused shall enjoy the right to be confronted with the witnesses
 17 against him and applies to state as well as federal prosecutions. (*Pointer v. Texas*
 18 (1965) 380 U.S. 400, 406). The Confrontation Clause bars the prosecution from
 19 using testimonial hearsay against a criminal defendant unless the declarant testifies
 20 at trial, or, if the declarant was unavailable to testify, and the defendant had a
 21 previous opportunity for cross-examination. (*Crawford v. Washington* (2004) 541
 22 U.S. 36, 124 S.Ct. 1354, 1363-1367.) The fact that an out-of-court statement may be
 23 admissible under the rules of evidence does not make it admissible despite the
 24 Confrontation Clause. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1364).

25 Various formulations of this core class of "testimonial" statements exist.
 26 Regardless of the precise articulation, some statements qualify under any definition

1 --for example, *ex parte* testimony at a preliminary hearing. Statements taken by
2 police officers in the course of interrogations are also testimonial under even a
3 narrow standard. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1364). The U.S.
4 Supreme Court took pains in *Crawford* to clarify that it used the term "interrogation"
5 in "its colloquial, rather than any technical legal, sense." (*Id.* at p. 1365, fn. 4.)

6 Allowing a police officer to testify about responses of suspected gang
7 members, victims, and witnesses to police questioning poses a serious threat to the
8 right to confront adverse witnesses. Involvement of government officers in the
9 production of testimony with an eye toward trial presents unique potential for
10 prosecutorial abuse--a fact borne out through history with which the Framers were
11 keenly familiar. This consideration does not evaporate when testimony happens to
12 fall within some broad, modern hearsay exception, even if that exception might be
13 justifiable in other circumstances. (*Crawford v. Washington, supra*, 124 S.Ct. at p.
14 1367, fn. 7.)

15 In the present case, Officer Nieves testified that in his opinion petitioner was a
16 West Side gang member. (RT 67). He based this opinion on a number of things,
17 including an acquaintance with petitioner going back six years and at least seven
18 field investigation reports. (RT 597-600). The Officer also opined that the crime was
19 committed for the benefit of the West Side gang. (RT 603). This was based partly
20 on the theory that an ongoing feud existed between the West Side gang and
21 Horseshoe, the gang affiliated with one of the witnesses. (RT 64). The expert did not
22 testify to the source of his information about the conflict between the gangs, only that
23 it may be related to "disrespect" to a West Side member's girlfriend (RT 65),
24 competition for low-level narcotics territory (RT 65-66), and destruction of the other
25 gang's graffiti "tags." (RT 64).

26 When a police officer questions an individual about his gang membership or
27

1 speaks with gang members about gang activities, a reasonably objective observer
2 would understand that the officer is gathering information that may be available for
3 use in a prosecution. Such police interrogation is testimonial for Confrontation
4 Clause purposes. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1364) This
5 hearsay should not have been admitted, for it violates the Sixth Amendment, as
6 petitioner was denied the right to cross-examine the gang members or other sources
7 of information on which Nieves based his opinions. (*Id.* at pp. 1363-1367).

8 The Confrontation Clause violation is not avoided by casting the hearsay
9 testimony as the basis for Officer Nieves' expert opinion. Like the hearsay exceptions
10 that did not exist when the Sixth Amendment was ratified, the rule that an expert may
11 rely on inadmissible evidence is of recent formulation.

12 The traditional rule is that an expert opinion is inadmissible if it is based upon
13 information obtained out of court from third parties. (*United States v. Bohie*, (9th Cir.
14 1971) 445 F.2d 54.) The rationale behind this rule is that the trier of fact should not
15 be presented with evidence grounded in otherwise inadmissible hearsay statements
16 not subject to cross-examination and other forms of verification.

17 However, recent decisions, especially in the Federal courts, indicate there is
18 an emerging trend in favor of admissibility. (*United States v. Williams*, 447 F.2d 1285
19 (5th Cir. 1971) (en banc), cert. denied 405 U.S. 954 (1972); *Jenkins v. United States*,
20 113 U.S.App.D.C. 300, 307 F.2d 637 (1962) (en banc); *State Highway Comm. v.*
21 *Oswalt*, (1970) 463 P.2d 602; *United States v. Sims* (9th Cir. 1975) 514 F.2d 147,
22 149).

23 Here, the appellate court relied upon *People v. Thomas*, (2005) 130
24 Cal.App.4th 1202, to support its contention that experts may use otherwise
25 inadmissible hearsay to form an opinion. *Crawford* did not "undermine the
26 established rule that experts can testify to their opinions on relevant matters, and

1 relate the information and sources upon which they rely in forming those opinions."
2 (*Id.* at p. 1210) This is true because experts are subject to cross examination about
3 his or her opinion and "the materials on which the expert bases his or her opinion are
4 not elicited for the truth of their content; they are examined to assess the weight of
5 the expert's opinion." (*Ibid.*)

6 Even if there was a strong emerging trend, in 1975, in favor of admissibility of
7 expert opinions based on inadmissible hearsay, and there is an "established rule" in
8 California allowing such admissibility, the admissibility of such expert opinion was not
9 established when the Sixth Amendment was ratified. Like the modern rules infringing
10 upon the Confrontation Clause which were struck down by *Crawford*, this recently
11 emerged trend should be seen for what it is: a limitation on the confrontation right
12 which the Framers never envisioned.

13 Even if the rule admitting opinions based upon inadmissible hearsay survives
14 *Crawford*, and even if Nieves' testimony of what many gang members told him is
15 labeled an opinion, the Confrontation Clause is nonetheless violated. The violation
16 posed by inadmissible hearsay is not cured by having an expert draw from that
17 inadmissible hearsay a conclusion that the matter asserted by the hearsay is correct.
18 In *United States v. Ordonez*, (9th Cir. 1984) 737 F.2d 793, the Ninth Circuit, having
19 ruled that certain ledger entries were inadmissible to prove the truth of the matter
20 asserted therein (*Id.* at p. 798), ruled also that an experts interpretation of those
21 ledger entries likewise offended the Confrontation Clause. (*Id.* at p. 806)

22 Here, the hearsay on which Nieves based his opinion that petitioner was a
23 gang member was not only used to assess the weight of Nieves' testimony, but was
24 used to prove that petitioner was in fact a member of the West Side gang. Similarly,
25 Nieves used the hearsay evidence supporting the theory of a feud between the
26 Gangs to draw a conclusion that the crime was related to and for the benefit of a

1 criminal street gang.

2 Consequently, petitioner's confrontation right was violated by the admission of
3 the testimonial hearsay by gang members, in the absence of any opportunity to cross
4 examine those gang members.

5 Violations of the Confrontation Clause are subject to harmless error analysis.
6 (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308) Reversal due to constitutional
7 error is not required where the State demonstrates beyond a reasonable doubt that
8 the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18,
9 24) The State cannot make that showing here.

10 Absent Officer Nieves' testimony that petitioner was currently a member of the
11 West Side gang and his testimony that the crime was committed for the benefit the
12 activities of West Side, the jury could not have found the criminal street gang
13 enhancement true, for there was little other evidence to support these contentions.
14 There was no direct connection between the shooting and the West Side gang: no
15 talk on the street and no graffiti. (RT 612) A witness was a member of the rival gang,
16 Horseshoe, but the victim was not. (RT 606) The victim simply raised his hands with
17 his palms up and said "what's up." (RT 66) Petitioner drove down Mastic Street days
18 after the incident, but he lived in the neighborhood (RT 608-9). Thus, without the
19 erroneously admitted hearsay, the jury could not have found that the enhancement
20 was true. Petitioner was further prejudiced by the denial by the state court's denial of
21 his petitioner for writ of habeas corpus. That denial was an "objectively
22 unreasonable" application of Sixth Amendment law. (*Wiggins v. Smith*, 539 U.S. 510;
23 state court judgment was "objectively unreasonable" insofar as a claim of prejudicial
24 inadmissible hearsay was rejected.)

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1 III. PETITIONER WAS DENIED HIS RIGHT TO A TRIAL BY IMPARTIAL
2 JURORS WHEN JUROR NUMBER 11 FAILED TO DISCLOSE HIS
3 RELATIONSHIP WITH A PROSECUTION WITNESS.

4 Under the Sixth and Fourteenth Amendments to the United States Constitution
5 and Article I, section 16 of the California Constitution, a person "accused of a crime
6 has a constitutional right to a trial by impartial jurors." (*In re Hitchings* (1993) 6
7 Cal.4th 97, 110) Voir dire examination protects the right to impartial jurors by
8 "exposing possible biases, both known and unknown, on the part of the potential
9 jurors. [Citation]" (Id. at p. 110) "[A] juror who conceals relevant facts or gives false
10 answers during the voir dire examination thus undermines the jury selection process
11 and commits misconduct." (Id. at p. 111). Juror misconduct raises a presumption of
12 prejudice that may be rebutted by proof that no prejudice actually resulted. (Id at p.
13 118).

14 The appellate court acknowledged that "there is considerable question whether
15 a prospective juror's unintentional failure to disclose material information during voir
16 dire may constitute juror misconduct. In more that one instance, the California
17 Supreme Court has either expressly declined to decide the question or has
18 expressed its doubts on the issue." (*In re Hamilton* (1999) 20 Cal.4th 273, 300; *In re*
19 *Hitchings, supra* 6 Cal.4th at 115-116)

20 In *Hamilton*, the court stated that "[t]here is serious question whether honest
21 voir dire mistakes can ever form the basis for impeachment of a verdict." (*In re*
22 *Hamilton, supra*, 20 Cal.4th at p. 300) But "[w]hat is clear is that an honest mistake
23 on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong
24 or incomplete answer hid the juror's actual bias." (*Ibid.*)

25 The question remains how a criminal defendant can gain proof that the juror's
26 wrong or incomplete answer hides the juror's actual bias. The *Hamilton* case arose
27 on a writ of habeas corpus where the Supreme Court issued an order to show cause

1 limited to certain issues, including whether the juror was actually biased or
2 incompetent, and whether she had concealed bias during the jury selection process.
3 (*In re Hamilton, supra*, 20 Cal.4th at p. 280) In voir dire, the juror admitted she had
4 learned details of the crime from a local newspaper but did not mention any other
5 pretrial exposure, including information from television and other newspapers, and a
6 conversation with a neighbor about the defendant's claim that someone else had
7 committed the crime. (*Id.* at p. 297-298) Despite an earlier declaration that the
8 alternate killer story was "ridiculous" and it convinced her that the defendant was
9 guilty, the juror insisted at the evidentiary hearing that her skepticism did not cause
10 her to prejudge petitioner's guilt. (*Id.*)

11 The referee as well as the Supreme Court found that the juror's admissions on
12 voir dire were inadvertent, not intentional. (*Id.* at p. 298) The Court also separately
13 determined that the juror was not biased at the time of the trial; any impression she
14 had formed from her conversations and media exposure almost a year before the
15 trial began "was insignificant over time and had long since dissipated," (*Id.* at p. 300)

16 Here. Juror Number 11 committed misconduct when he failed to disclose that
17 he knew the prosecution's witness, Officer Fonua. On voir dire, the juror admitted he
18 knew the County District Attorney, the Sheriff, and other police officers. On the third
19 day of trial, Officer Fonua informed the court that he knew Juror Number 11. (RT
20 561-562). The juror's wife was the sister of the officer's girlfriend. (RT 562). The
21 officer stated, "I always see him at Christmas, Thanksgiving, and that kind of thing.
22 You see him at the table. You talk to him". (RT 562). When asked by the court if
23 there was a blood relationship, the officer responded "No, but I see him quite often."
24 (RT 562).

25 Juror Number 11 did not recognize the Officer at first but the two had been
26 together the weekend before. (RT 563). The juror responded, "Oh, of course. I'm

1 not used to seeing you in your clothes. I guess we're related, Your Honor." (RT 563-
2 564). Instead of conducting a factual inquiry into the potential bias of the witness,
3 the court simply asked Juror Number 11 whether the relationship would affect his
4 "ability to be fair and impartial in this case." (RT 564). The juror said it would not. (RT
5 564). When asked if he would give the officer's testimony any more weight than he
6 ordinarily would, the juror responded "no." (RT 564).

7 While Juror Number 11's conduct was not necessarily willful or intentionally
8 dishonest, his failure to divulge the relationship of his sister-in-law with a homicide
9 detective deprived petitioner the ability to ensure an unbiased jury. In this case, even
10 an honest mistake should disturb the judgment because the juror's incomplete
11 answer to the voir dire questions probably hid his actual bias against petitioner. The
12 two spent significant family holidays together and the juror referred to them as
13 "related." Most importantly, the two had been together at a social gathering only two
14 or three days before Officer Fonua was called to testify.

15 The state appellate court was satisfied that the juror could be fair and impartial
16 Yet, the trial court's inquiry consisted of two cursory questions and the juror's blanket
17 denial of any bias. An evidentiary hearing into the actual extent of the juror's bias
18 should have been conducted. Otherwise, petitioner could never have the "proof"
19 required by the *Hamilton* court of the juror's actual bias.

20 Further inquiry into the relationship and more specifically into the conversations
21 between the two that may have occurred on the eve of trial could have revealed
22 significant prejudice against the defendant. Unlike the factual situation in *Hamilton*,
23 the potential bias here was ongoing; the relationship between the juror and the
24 witness was currently close and would probably continue throughout the trial and
25 beyond. There was no time between the misconduct and the trial; in fact, Juror
26 Number 11 and Officer Fonua saw each other after the jury had been impaneled,

1 spending an evening together at a social gathering with ample opportunity to discuss
2 petitioner's trial only days before facing each other in court.

3 At the very least, the facts here present a compelling argument that
4 unintentional failures to disclose material information during voir dire can constitute
5 juror misconduct. The court may then conduct further inquiry into the potential bias to
6 ensure the defendant has an impartial jury. This policy will promote full disclosure by
7 the jurors which would in turn illuminate bias during voir dire and allow the defendant
8 to challenge the juror for cause or use a peremptory challenge. Petitioner was denied
9 the right to do this and was thus prejudiced by impaneling a biased jury. Petitioner
10 was further prejudiced by the denial by the state court's denial of his petitioner for
11 writ of habeas corpus. That denial was an "objectively unreasonable" application of
12 Sixth Amendment law. (*Wiggins v. Smith*, 539 U.S. 510; state court judgment was
13 "objectively unreasonable" insofar as a claim of impartial jury was rejected.)

14 CONCLUSION

15 Based upon the reasons stated above, petitioner respectfully requests that his
16 petition for writ of habeas corpus be granted.

17 Dated: February 5, 2008

Respectfully submitted,

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20 Allen H. Schwartz
Attorney for Petitioner,
Lionel Rubalcava
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Traverse in Support of Petition for
Writ of Habeas Corpus